In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 82

ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE,
Petitioner,

v.

OREGON STEVEDORING COMPANY, INC.,
Respondent.

BRIEF OF RESPONDENT OREGON STEVEDORING COMPANY, INC. IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

ALFRED A. HAMPSON,
1011 Equitable Building,
Portland 4, Oregon,
Counsel for Respondent.

FLOYD A. FREDRICKSON,
1005 Equitable Building,
Portland 4, Oregon,
Of Counsel for Respondent.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 3-63

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No. 876

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STATEMENT OF THE CASE

One important fact is omitted in Petitioner's Statement of the Case. Respondent, Oregon Stevedoring Company, Inc., was performing its services to Petitioner under a contract by which the stevedoring company agreed to be responsible for personal injury caused by its negligence and the Petitioner agreed to be responsible for injury caused by its negligence or by failure of the ship's gear (Appx. p. 12). The District Court found

that the stevedoring company had not been negligent in any way and this finding was not contested on appeal (Appx. p. 12).

REASONS WHY PETITION SHOULD NOT BE GRANTED

1. This Case Did Not Decide an Important Question of Maritime Law.

In the six years since the decisions in *Ryan Stevedore Co.* v. *Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956), only two cases have considered the question of the responsibility of a contractor to a shipowner when that contractor is free from fault. The one case is *Booth S.S. Co. v. Meier & Oelhaf Co.*, 262 F.2d 310 (1958) involving a repair contractor. The other is the instant case. Obviously, the issue arises in very few cases.

Secondly, this Court has already established the principle of law invplved. In *Ryan Stevedore Co.* v. *Pan Atlantic S.S. Corp.*, 350 U.S. at 130, this Court said in reference to contractural obligation of a stevedore to a shipowner that such language constitutes "a contractual undertaking to stow the cargo 'with reasonable safety' . . .". In the instant case, the trial court after hearing the evidence determined that the stevedore had performed with reasonable safety. The Petitioner merely failed to sustain its burden of proof and is dissatisfied with the result. This Court should not be expected to decide as a matter of law that a certain set of facts establishes a breach of warranty when the issue is one of fact under the test laid down by this Court in the *Ryan*

case. *Weyerhaeuser S.S. Co.* v. *Nacirema Co.*, 355 U.S. 563, 567, 568.

2. A Conflict in the Decisions of Courts of Appeal Will Not Be Removed by a Decision of this Court in this Case.

That there is a conflict between the Courts of Appeal in the Ninth Circuit and the Second Circuit on the interpretation of the term "warranty of workmanlike service" as it relates to suppliers of services to a ship is obvious. However, a decision by this Court in the instant case will not resolve the conflict. In the *Booth S.S. Co.* case, 262 F.2d 310 (1958), there was no express contract defining the responsibilities of the contracting parties. In the instant case, a contract set forth the respective responsibilities of the parties (Appx. p. 12). A decision by this Court, even if favorable to Petitioner, will only mean that the case will be sent back to the Court of Appeals for a determination of the meaning of the express contract. There is not presented to this Court the clear-cut question whether an implied warranty of workmanlike service includes indemnity insurance for non-negligent conduct because in this case the contracting parties specifically agreed upon their respective responsibilities.

3. The Decision of the Court of Appeals is Not in Conflict with Applicable Decisions of this Court.

The Court of Appeals in its opinion carefully reviews the decisions of this Court which have discussed the test to be applied in defining the warranty of workmanlike service (310 F.2d at pp. 484-487; Appx. pp. 17-20). The conclusion of the Court of Appeals that the test is one

of negligence or fault is buttressed by much language cited by the Court of Appeals.

Petitioner's assertion regarding the implications of the language in *Waterman S.S. Corp.* v. *Dugan & McNamara*, 364 U.S. 421, 424, is wholly without merit. The language quoted is to the effect that both the owner and the ship are liable to a longshoreman if a stevedore causes a vessel to become unseaworthy. This Court was referring to the contention made by the Respondent stevedore that the fact the longshoreman's original claim was in personam rather than in rem should make a distinction in the indemnity claim by the shipowner. This Court merely pointed out that the owner as well as the ship itself is a beneficiary of the warranty of workmanlike service.

As a matter of fact, the language of this Court in the *Waterman* case illustrates the consistency between the opinion of the Court of Appeals in the instant case and the decision of this Court. This Court states at p. 423:

> "The warranty may be breached when the stevedore's *negligence* (italics ours) does no more than call into play the vessel's unseaworthiness."

The warranty is one of non-negligent conduct and this is exactly what the Court of Appeals holds in the instant case. This Court in the case of *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Company*, 355 U.S. 563 (1958) points out that the respective liabilities of shipowner and stevedore rest on different principles. The shipowner's liability to the longshoremen rests on the

failure of the shipowner to perform a non-delegable duty to provide a seaworthy ship. The liability of the stevedore to the shipowner rests on its obligation to perform its stevedoring operations with reasonable safety. 355 U.S. at 567, 568. It is a question of fact whether the stevedore has so performed and here the finding of fact by the trial court is that the stevedore did perform with reasonable safety. There is no conflict at all between the decision of the Court of Appeals and applicable decisions of this Court.

4. There is no Public Policy Consideration to Avoid Risk of Injury in this Case.

This claimed ground for allowing certiorari is without merit. The trial court found and it is not contested that there was no fault on the part of the stevedore. The decision in this case does not allow a negligent stevedore to escape liability. The Petitioner complains that the stevedore has a better opportunity to keep records and make tests of its equipment; but, there is no proof in this case of any failure to keep records or make tests. All that this decision imports is there must be some proof of such failure as suggested by Petitioner. Petitioner falls into the same error as noted by the Ninth Circuit in its footnote 6 at page 484 of its opinion (Appx. p. 16). What sense does it make to impose liability without fault and then base it on considerations of fault?

What Petitioner is really complaining about is that it is liable to the longshoreman without fault. Unfortunately for the shipowner, that is the law applicable to his calling. Here, he complains that his rights against

others are not as great as the longshoreman's rights against him. To allocate the risk in this case to the stevedore is to allocate the risk to another party, who is at least as innocent as the shipowner. Presumably, the shipowner is just as financially able to shoulder the risk of loss as the stevedore.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

ALFRED A. HAMPSON,
1011 Equitable Building,
Portland 4, Oregon,
Counsel for Respondent.

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1005 Equitable Building,
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